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IN THE

Supreme Court of the United States

October Term, 1961

No. 251

MAURICE F. O'CONNELL, *et al.*,

Petitioners,

—against—

JAMES E. ALLEN, Commissioner of Education of the State of New York, THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

LOUIS MANSDORF
Attorney for Petitioners
320 Broadway
Borough of Manhattan
New York 7, New York

EMANUEL N. FRANKEL,
Of Counsel.

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

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IN THE

Supreme Court of the United States

October Term, 1961

No.

MAURICE F. O'CONNELL, et al.,

Petitioners,

—against—

JAMES E. ALLEN, Commissioner of Education of the State of New York, THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

The petitioner, MAURICE F. O'CONNELL, for himself and on behalf of others similarly situated*, prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York, dated April 27, 1961, and entered on May 5th, 1961 in the office of the Clerk of the Supreme Court, Albany County.

Opinions Below

The Court of Appeals order, (without opinion), denying a motion for leave to appeal (not yet officially reported),

* An itemized list of each petitioner is set forth in Appendix "A".

is appended hereto as Appendix "B"; the order of the Appellate Division, Third Department, denying leave to appeal to the Court of Appeals is reported in 12 App. Div. 2d 861, 210 N. Y. S. 2d 821, and is appended hereto as Appendix "C".

Pursuant to stipulation (Appendix "D"), the O'Connell petitioners agreed with respondents that the decision of the Appellate Division, Third Department, in *Wolfson* v. *The State Education Department* et al., presenting identical issues and then pending in that court, would be the decision in *O'Connell.*

The opinion of the Appellate Division, Third Department in *Wolfson*, affirming the lower court, is reported in 11 App. Div. 2d 891, 203 N. Y. S. 2d 261, and is appended hereto as Appendix "D-1" and the order entered thereon is appended hereto as Appendix "E"; the opinion of the Supreme Court, Albany County (Elsworth, J.) in *Wolfson* is unreported but is contained on pp. 38-39 of the *Wolfson* record, and the order entered thereon is set forth on pp. 3-4 of said record.

The opinion of Bookstein, J., in the Supreme Court, Albany County, in *O'Connell* is unreported but is appended hereto as Appendix "F"; and the order based thereon is Appendix "G".

Grounds on Which Jurisdiction Is Invoked

(i) The final order of the Supreme Court, Albany County was entered on May 5, 1961 (Appendix "A") based upon the order of the Court of Appeals dated April 27, 1961 denying leave to appeal.

(ii) No motion for rehearing was made or extension of time applied for.

(iii) The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

Statutes Involved

Education Law:

§ 7403, subd. 2, L. 1959, c. 718, § 1.

§ 7403, subd. 2, L. 1960, c. 332, (16 McKinney's, Part 3, Con. L.)

1 McKinney's Statutes, §§ 76, 193, 365.

(The aforementioned statutes and statutory construction rules, are set forth in Appendix "H".)

Questions Presented for Review

1. Were the petitioners' property rights and privileges guaranteed by the Fourteenth Amendment violated by the denial of their applications for certificates as "Certified Public Accountants" made pursuant to the provisions of Education Law § 7403, subd. 2, as amended by L. 1959 c. 178, § 1, effective April 23, 1959?

2. Were the petitioners' property rights and privileges guaranteed by the Fourteenth Amendment violated by the refusal of the State Court to direct respondents to issue said certificates as "Certified Public Accountants"?

Statement of the Case *

Petitioners seek an order directing the respondents to issue them certificates as certified public accountants pursuant to the provisions of § 7403, subd. 2 of the Education Law, as amended by Chapter 718, Laws of 1959, effective April 3, 1959 (19-29)** which petitioners contend does not require that they pass an examination.

As provided by the statute, each of the petitioners has been graduated from a college offering a curriculum in accounting which was registered and approved by the State Education Department.

Applications and checks in payment for the applied certificates were duly forwarded to the Education Department pursuant to the aforesaid statute. All applications were rejected by respondents on the ground that the petitioners were required to take and pass examinations before certificates would be issued.

Subsequently, on March 31, 1960, § 7403 subd. 2 was amended to provide specifically for the passing of an examination by all applicants for "C.P.A." certificates, § 7403, subd. 2, L. 1960, c. 332).

---

* All facts, folio and page references refer to the record in the Test Case of *Wolfson* v. *State Education Department*, Case #2412, Appellate Division, Third Department. *These facts are admitted by the pleadings.* The parties hereto stipulated on May 19, 1960, that the decision of the Court in *Wolfson* be made the decision in the within case, *O'Connell et al.* v. *Allen, et al.*, which bears Case #2921, in the Appellate Division, Third Department. (See Appendix "D" for stipulation.)

** All references are to folio numbers in record of *Wolfson* v. *State Education Department, et al.*

The facts of the petition in *O'Connell* are admitted, the respondents having interposed an objection in point of law that the petition fails to state facts sufficient to constitute a cause of action.

Timely Raising of Federal Question

The federal questions referred to hereinabove, sought to be reviewed, were raised, as follows:

In *Wolfson*, the issue was raised in the Supreme Court, Albany County, by the very nature of the Article 78, Civil Practice Act proceeding to compel the State Department of Education to recognize and enforce the petitioners' rights and to compel the issuance of a "C.P.A." certificate as required by statute (R. 8, 9) and denied (R. 39). In the Appellate Division, Third Department, the constitutional issues were raised by Petitioner's Reply Brief, p. 3, the court opinion making no reference thereto.

In *O'Connell*, the petition raised the identical issues as *Wolfson*. In Petitioners' amicus brief in *Wolfson*, the constitutional issues were raised on p. 25 of the *O'Connell* brief. No reference was made thereto by the Appellate Division, Third Department. In the Court of Appeals, the issue was again raised in Appellants' Brief, Point IV, p. 36, but no reference made thereto by that Court.

Reasons for Granting Writ

Where the interpretation of a state statute by The Court of Appeals of the State of New York is arbitrary and unreasonable and results in the deprivation of property rights

under the Fourteenth Amendment of the United State Constitution, this Court should determine for itself the issues involved under the equal protection clause.

POINT I

Petitioners' property rights and privileges under the Fourteenth Amendment were violated by the denial of their applications for certificates as certified public accountants pursuant to statute, and the refusal of the Court to direct respondents to issue same.

A. The Statute and Its Amendment

Petitioners assert their claim to certificates as "Certified Public Accountant" under the Education Law, § 7403. sub. 2, L. 1959, c. 718 § 1 (effective April 23, 1959). This statute specifically provides for the issuance of a C.P.A. certificate to an individual who is a high school graduate

> "*and either* (a) has been graduated from a college, offering a curriculum in accounting which shall have been registered by the Department, *or* (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commission and has the professional experience required by the regulations of the commissioner and passes the examination required by the department . . . (Emphasis supplied.)

The petitioners claim compliance with subdivision (a).

Thereafter on March 31, 1960 the legislature amended § 7403, sub. 2 by L. 1960, c. 332, to specifically require a high school graduate to have "been graduated from a college after completing a curriculum in accounting which

shall have been registered by the department" or "graduated from a college with the equivalent college training in accountancy" *and* "passes the examination".

The petitioners having acted under the 1959 law, filed their petitions and applications with filing fees and records, and created a constitutionally irrevocable contract which neither the subsequent legislature nor the Department of Education can impair.

The interpretation of the 1959 statute has been varied by the court to mean exactly what the 1960 amendment effected, to wit: that an applicant for a C.P.A. certificate must pass an examination despite the fact that he was "graduated from a college offering a curriculum in accounting which shall have been registered by the department".

However, where the 1959 statutory intent was plain and unambiguous, the court could not construe such statute to vary its meaning. *McCluskey* v. *Cromwell*, 11 N. Y. 2d 593, 601-602; *New Amsterdam Casualty Company* v. *Stecker*, 3 N. Y. 2d 1, 6; *Tishman* v. *Sprague*, 293 N. Y. 42, 50. Neither the court nor the legislature can declare, retroactively, that an existing statute, or a statute involved in litigation, shall receive a construction contrary to that which the statute would ordinarily have received. *Roosevelt Raceway, Inc.* v. *Monaghan*, 9 N. Y. 2d 293, 304-305, 213 N. Y. S. 2d 729, 735.

In the instant case, the Supreme Court, Albany County, Special Term, and the Appellate Division, Third Department, varied the meaning of the 1959 statute by disregarding the specific *disjunctive* requirement between subdivisions (a) and (b) "either . . . or", of § 7403 subd. 2

(1959 statute) of the Education Law. Instead it imposed a *conjunctive* interpretation upon this phrase in complete disregard of § 365, Statutes, Book 1, McKinney's Consolidated Laws which declares:

> ". . . When 'or' is used in connection with 'either' it is difficult, if not impossible, to interpret it as 'and'."

The lower courts ignored subdivision (a) completely, and applied subdivision (b) exclusively!

If the 1959 statute meant what the courts said it does, then there was no need for the 1959 statute and much less need for the 1960 amendment.

The crux of the lower court's opinions is that it is inconceivable that the legislature would pass a statute permitting certification as a Certified Public Accountant without the express passing of an examination. Of course, the wisdom of a statute is not the concern of the courts. Besides, history shows numerous legislatures to have so acted on more than one occasion.

In 1860, In re: *Cooper*, 22 N.Y. 67, 87-88, 94, the New York Court of Appeals upheld a statute authorizing the admission to the bar of New York of all Columbia Law School College graduates *without passing a further examination.*

In 1947, the New York legislature, L. 1947, C. 340, provided that a certificate as a "Certified Public Accountant" may be issued to all applicants who had 15 years of experience, *without* requiring said applicants to take and pass *an examination.* This statute was repealed one year later by L. 1948, c. 629.

In *Elliott* v. *University of Illinois*, 365 Ill. 338, 6 N.E. 2d 647, 651, cert. den. 302 U. S. 691, the Illinois Court of Appeals held as constitutional the legislative act authorizing the granting of a certificate as a "Certified Public Accountant" to 21 year old graduates from the University of Illinois *without further examination other than graduation from that university.*

In *Dent* v. *State of West Virginia*, 129 U. S. 114, 121, 122, 9 S. Ct. 231, 233, 32 L. ed. 623, this Court upheld as valid a state regulation for licensing doctors, *without examination*, provided the doctors were graduated from a reputable medical college *or* practiced medicine for ten years.

In *Graves* v. *Minnesota*, 272 U. S. 425, 428, 75 S. Ct. 461, 466, 99 L. ed. 563, this Court upheld the statute licensing dentists to practice their profession provided the licensees held a diploma from a reputable dental college. *No special examination* was required here.

The interpretation of the 1959 statute that compulsory examinations are required, is not justified, because it is an arbitrary and unreasonable restriction which interferes with a lawful business or occupation. Such restrictions are invalid. *Liggett Company* v. *Baldridge*, 278 U. S. 105, 113, 49 S. Ct. 57, 59, 73 L. ed. 204, 208.

The lower court's construction nullified the statutory legislation and substituted therefor, judicial legislation.

B. Federal Jurisdiction

The petitioners herein do not claim that the statute involved is unconstitutional. They do claim that the administration of the 1959 statute by the respondents and the

interpretation thereof by the courts of New York State have deprived them of valuable property rights.

The right to practice accounting as a profession is a constitutional "liberty" and "property" right, *Greene* v. *McElroy*, 360 U. S. 474, 492, 79 S. Ct. 1400, 3 L. ed. 2d 1377, 1378; *Dent v. State of West Virginia*, 129 U. S. 114, 121, 122, 9 S. Ct. 231, 233, 32 L. ed. 623; *Schware v. Board of Bar Examiners*, 353 U. S. 232, 239, 1 L. ed. 2d 796, 77 S. Ct. 752, which the state legislature has the authority to regulate and control. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 611, 79 L. ed. 1086.

Where, however, the legislature has enacted a statute, compliance therewith by the beneficiaries thereof creates a valid and binding contract which cannot be subsequently breached by the courts or succeeding legislatures without impairing contractual obligations protected by the Fourteenth Amendment. *Indiana* ex. rel. *Anderson* v. *Brand*, 303 U. S. 95, 104; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637, 63 S. Ct. 1178, 87 L. ed. 1628; *New Jersey* v. *Yard*, 95 U. S. 104, 114.

The improper conduct of state officers in the administration of a state statute creates the basis for a charge of violation of the Fourteenth Amendment. *Mooney* v. *Holohan*, 294 U. S. 103, 112-113, 55 S. Ct. 340, 342, 79 L. ed. 791. In the instant case, the refusal to issue a C.P.A. certificate to petitioners constitutes conduct in violation of the Fourteenth Amendment.

Although the construction of a state statute lies exclusively within the province of the state courts, such construction is not final where the Fourteenth Amendment

is violated. In such cases, this Court will grant certiorari, *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 245, 246, 52 S. Ct. 133, 135, 76 L. ed. 265; and may reconsider the state interpretation where it is violative of the Fourteenth Amendment. *Herbert* v. *Louisiana*, 272 U. S. 312, 316-317, 47 S. Ct. 103, 71 L. ed. 270; *Voight* v. *Webb*, (D. C. Wash.), 47 F. Supp. 743.

Every state official, high or low, is bound by the Fourteenth Amendment, *United States* v. *Raines*, 362 U. S. 17, 25, 80 S. Ct. 519, 525, and where federally protected rights have been invaded, this Court will grant the necessary relief. *Bell* v. *Hood*, 327 U. S. 678, 684, 66 S. Ct. 773, 90 L. ed. 939; *Smith* v. *Allwright*, 321 U. S. 649, 664.

The issue of petitioners' rights was timely raised by the petition in the State courts by the very nature of the proceeding and more specifically by the application for leave to appeal to the Court of Appeals. This is timely application for this Court to entertain jurisdiction. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 366-367, 53 S. Ct. 145, 77 L. ed. 360.

Unless this Court grants certiorari, the petitioners will be irreparably injured.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Supreme Court of the State of New York should be granted.

Respectfully submitted,

LOUIS MANSDORF
Attorney for Petitioners
320 Broadway
Borough of Manhattan
New York 7, New York

EMANUEL N. FRANKEL,
Of Counsel.

APPENDIX A

List of Petitioners

MAURICE F. O'CONNELL

and

SIDNEY ABRAMS
MORRIS ACKERMAN
MILTON AUERBACH
JOHN J. BARBIERI
SAMUEL R. BECKER
LAWRENCE BERNSTEIN
DAVID BLANK
MILTON BRAND
MORRIS BREVDA
JACK BUDNICK
FRANK P. CALABRO, JR.
IRVING CALLAN
MEYER COOPERBERG
JOSEPH R. CONTE
COSMO T. COSMIDES
GEORGE COVEN
JOSEPH DANCIK
PHILIP S. DAVIDSON
BERNARD DEUTSCH
ALBERT B. DORF
ALEXANDER DRUCKER
DAVID DUBOFF
EDWARD EIGER
JEROME EISEN
ARNOLD EPSTEIN
JOSEPH FAJANS
ARNOLD FELDMAN
JEROME J. FELDMAN
ALBERT S. FELLER
SIDNEY FINGERET
MORRIS FISHMAN
WALTER FORMAN
EMANUEL N. FRANKEL
SOLOMON FRIED
PHILIP GALLUB
SAMUEL GELBER
HAROLD GILBERT
JEROME J. GINSBERG
ALEXANDER GLICK
LEO GOLDMAN
NORTON GOLDMAN
SOL GOLDMAN
SIDNEY M. GOODFRIEND
PHILIP GRAFF
MICHAEL R. GRASSO
STANLEY A. GREEN
MASON S. GREENLAND
MARTIN GREENMAN
A. DAVID GRINKER
ARTHUR GROSSMAN
AMBROSE GUSMANO
MORTIMER D. HAUT
SEYMOUR H. HENDEL
ARTHUR HIXON
JACK HOLLDAY
FRED IHLO
SAMUEL M. IMPORT
ALEXANDER M. INTRATOR
HENRY JACOLOW
CARL JURAVEL
DAVID KAGAN
SAMUEL KAPIT
BERTRAM KEYSERLING
LAWRENCE J. KRAMER
JOSEPH I. LASSMAN
JOSEPH R. LATINO
LEO H. LEMONT
RUDOLPH J. LILLIENFELD
SEYMOUR LINDENBAUM
SOLOMON LIPPER
NORMON LIPPMAN
DAVID LUBOWITZ
LEO MANCHER
ALBERT MANDEL
WILLIAM L. MARX
ANTHONY A. MASTRIACO

Appendix A—List of Petitioners

Milton R. Matte
Richard J. May
William E. Mayer
Morton Meyers
Paul Miller
Samuel Mittleman
Ralph V. Morese
Jerome Moskowitz
Louis J. Moskowitz
Louis Mysel
Samuel I. Newman
William Nichols
Leon H. Paisner
Abraham Papish
Louis Park
Moses Park
Vincent P. Petruccelli
Harry P. Flaster
Samuel S. Platt
Samuel N. Posses
Alexander Preiser
Melvyn J. Raphael
Abraham L. Rappaport
Edward Rappaport
Philip Reader
Frederick A. Resnick
Morris Rosenbaum
Norman Ross
Seymour Rubinstein
Carl Sanfilippo
Nathan Schoenfeld
Abraham Schreibman
Louis Schreibman
Jerome J. Schulman
Charles Schwartz
Julius E. Seide
Ralph J. Selby
Samuel Shapiro
Sherman Sheinthal
Robert E. Siegel
Leo Small
Bernard Solomon
Herbert L. Sonking
Seymour Sperber
Bertram L. Steinberg
Harry Stern
Sidney Stitch
George Stone
Benjamin Strauss
Seymour Temkin
Carl S. Tobin
Marvin Todeld
Sing G. Tom
Mario F. Triolo
Samuel L. Waldbaum
Ralph Walters
Emanuel Wasserman
Aaron M. Weinstein
Stanley Weiss
Ely Wishnick
Irwin Wissner
Alice S. Witte
Kenneth B. Wordsworth
Stewart L. Yanover
Charles Zaslow
Harvey L. Zuckerman

Additional Names to Schedule A

Jack B. Erich
Milton Fialco
Murray Geller
Alfred Gittleson
Stanley Goldstein
Percy Greenberg
David Loring
Bernard J. Martin
Sam Merle
Arthur Murray
Bernard Norvid
Bernard Robbins
Arthur Schwartz
Bernard Silver
Sol Tapper
Geral Weingartner
John West

APPENDIX B

Order of Court of Appeals Denying Motion for Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-seventh day of April, A. D. 1961.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 259

In the Matter of the Application of
MAURICE F. O'CONNELL and others similarly situated, &c.,

Appellants,

—vs.—

JAMES E. ALLEN, Commissioner of Education of the State of New York, The State Education Department, Division of Professional Education, University of the State of New York,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part

of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs.

[Seal]

GEARON KIMBALL
Deputy Clerk

SIR:

Please take notice that the foregoing is a true copy of an Order made in the above entitled matter and duly entered and filed in the office of the Clerk of the County of Albany, on the 5th day of May, 1961.

Dated, Albany, N. Y., May 9, 1961

CHARLES A. BRIND
Attorney for Respondents
(address)

To:

LOUIS MANSDORF, Esq.
Attorney for Appellants
(address)

APPENDIX C

Order of Appellate Division Denying Motion for Leave to Appeal to the Court of Appeals

At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department held in the Courthouse in the City and County of Albany commencing on the 19th day of January, 1961.

Present:

HON. FRANCIS BERGAN
Justice Presiding

HON. WILLIAM H. COON
HON. JAMES GIBSON
HON. J. CLARENCE HERLIHY
HON. WALTER B. REYNOLDS
Associate Justices

2412

In the Matter of
The Application of MAURICE F. O'CONNOR, et anos,
Petitioners-Appellants

for an Order under Article 78 of the Civil Practice Act,

—v.—

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York, The State Education Department, Division of Professional Education, University of the State of New York,
Respondents-Respondents.

Appendix C—Order of Appellate Division Denying Motion for Leave to Appeal to the Court of Appeals

The above-named petitioners-appellants in this proceeding having moved for leave to appeal to the Court of Appeals from the unanimous order of this Court entered in the office of the Clerk of this Court on the 3rd day of November, 1960, affirming the order of the Special Term of the Supreme Court in the above-entitled proceeding, entered in the office of the Clerk of the County of Albany on the 3rd day of November, 1960, which order dismissed the petition herein seeking a review of a determination of the State Education Department Commissioner of Education dismissing the appeal, in refusing certification, as Certified Public Accountant, of petitioners-appellants for failure to comply with the requirements of the Education Law with respect to passage of an examination.

Now, upon reading and filing the notice of motion dated the 2nd day of December, 1960, and the affidavit of Sidney H. Asch, Esq., sworn to on the 2nd day of December, 1960 in support of said motion and the affidavit of Charles A. Brind, Esq., attorney for respondent Commissioner of Education, sworn to on the 13th day of December, 1960, in opposition thereto, and due deliberation having been had, it is

ORDERED, unanimously that the said motion for reargument, or in the alternative, for permission to appeal to the Court of Appeals be, and the same hereby is, denied, without costs.

JOHN J. O'BRIEN
Clerk

Entered March 1, 1961
A true copy
JOHN J. O'BRIEN
Clerk

APPENDIX D

Stipulation as to Decision of Appellate Division, Third Department

SUPREME COURT
OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

In the Matter of the Application of

MAURICE F. O'CONNELL, et al.,

Petitioners-Appellants,

for an Order under Article 78 of the Civil Practice Act

—against—

JAMES E. ALLEN, Commissioner of Education of the State of New York, THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNIVERSITY OF THE STATE OF NEW YORK,

Respondents-Respondents.

The above named petitioners-appellants having served and filed their notice of appeal from the order of Mr. Justice Isadore Bookstein, dismissing their petition, made and filed in the office of the Clerk of Albany County on the 22nd day of January 1960 and the attorneys for the respective parties having agreed that the issues on this appeal are similar to the issues in the case of Hyman Wolfson against

the State Education Department, which appeal will be argued before this Court on May 19, 1960.

Now, THEREFORE, subject to the approval of this Court, it is hereby stipulated by and between the attorneys for the respective parties that the decision of this Court in the Wolfson case be the decision in the above case, and the order of affirmance or of reversal will be made and entered in this case as in the Wolfson case.

Dated: New York, N. Y., May 19, 1960.

SIDNEY H. ASCH
Attorney for Petitioners-Appellants

CHARLES A. BRIND
Attorney for Respondents-Respondents

SO ORDERED:

.....
Justice of the Appellate Division
of the Supreme Court, Third
Judicial Department.

APPENDIX D-1

Decision of Appellate Division, Third Department in Wolfson v. State Education Department

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

Decision handed down Jul 27 1960

2412

In the Matter of the Application of HYMAN WOLFSON,

Petitioner-Appellant,

for an Order under Article 78 of the Civil Practice Act

—v.—

THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNIVERSITY OF THE STATE OF NEW YORK,

Respondent-Respondent.

Appeal from a decision of a Special Term, Albany County Supreme Court (Elsworth, *J.*).

For over sixty years with the exception of a short and carefully prescribed period, the successful passing of an examination has been necessary in New York to become a certified public accountant. Petitioner, who has not passed the examination and has not presented to the State Education Department evidence of acceptable accounting experience argues that a construction of the words of Educa-

tion Law, § 7403, subd. 2, as amended by Laws of 1959, ch. 718, would have permitted his certification while that statute was effective without examination and without evidence of accounting experience. The Court at Special Term has dismissed the petition. It is necessary to examine the language to understand the argument. The pertinent language is as follows: " § 7403(2). An individual shall not be eligible to apply for a certificate as certified public accountant unless he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner, and either (a) has been graduated from a college, offering a curriculum in accounting which shall have been registered by the department, or (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner, and has the professional experience required by the regulations of the commissioner, and passes the examination required by the department. . . ."

Petitioner's argument requires that the two alternatives attached separately to (a) and (b) following the word "either" be read so that all the language following (b) fully to the end of the sentence is an alternative to the language attached to (a).

To read the language this way a person who merely graduates from a college which offers a curriculum in accounting "registered" by the department would be entitled to become a certified public accountant with neither the usual accounting experience nor any qualifying examination, while a college graduate who has "equivalent college train-

ing in accountancy as determined by the commissioner" must pass an examination and also have qualifying experience. Such a distinction does not make senses as a matter of legislative policy looking at the language itself; and when the entirely different purpose which led to the enactment of the 1959 amendment is seen, together with the long history of regulation of public accountancy, it is perfectly apparent that the Legislature had no such distinction in mind as that for which the petitioner argues.

It seems obvious that punctuation was left out of the text after the word "commissioner" in the part attached to (b). But punctuation is not the only means of separating thought in the English language. The conjunction "and" is often used for this purpose and meaning depends on the sense of the other words. Here the (a) and (b) following "either" were both concerned with formal college pretraining for accountance or its equivalent.

But after the word "commissioner" the conjunction "and" introduced a different idea, i.e., the professional experience beyond formal education; the second "and" introduced a still different idea—the examination. Internal construction of the language of the sentence, without any resort to past general legislative history or policy, indicates that the meaning petitioner places on the words does not reflect legislative intention.

Order unanimously affirmed without costs.

Present—Bergan, P.J., Coon, Gibson, Herlihy and Reynolds, JJ.

APPENDIX E

Order of Affirmance of Appellate Division, Third Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Department, held in the Courthouse in the City and County of Albany, commencing on the 31 day of October 1960.

Present:

HON. FRANCIS BERGAN

Justice Presiding

HON. WILLIAM H. COON
HON. JAMES GIBSON
HON. J. CLARENCE HERLIHY
HON. WALTER B. REYNOLDS

Associate Justices

In the Matter of the Application of

MAURICE F. O'CONNELL, et. al.,

—against—

THE STATE EDUCATION DEPARTMENT
DIVISION OF PROFESSIONAL EDUCATION
UNIVERSITY OF THE STATE OF NEW YORK,

Respondents-Respondents.

Appendix E—Order of Affirmance of Appellate Division, Third Department

The Petitioners-Appellants, having appealed to this Court from an order of the Supreme Court of the State of New York, Albany County, at Special Term, entered in the Office of the Clerk of the County of Albany, on the 7th day of April 1960, which order dismissed the proceedings instituted by the petitioners herein on the merits without costs and the attorneys for the respective parties having agreed and stipulated that the issues on this appeal are similar to the issues in the case of Hyman Wolfson against the State Education Department which appeal was to be argued before this Court on May 19, 1960 and having furthere stipulated subject to the approval of this Court that the decision of this Court in the Wolfson case be the decision in the above-entitled matter and that an order of affirmance or of reversal would be made and entered in the above-entitld case as in the Wolfson case and the appeal in the case of Hyman Wolfson against the State Education Department having been argued before this Court at the Term above stated by Hyman Wolfson, Esq., attorney for Petitioner-Appellant in that case and Charles A. Brind, Esq., attorney for Respondents-Respondents in that case and this Court at the same time having heard arguments by Sidney H. Asch, Esq., attorney for Petitioners-Appellants Maurice F. O'Connell, et al. and a brief having been filed *Amicus Curiae* by said Sidney H. Asch, Esq., attorney for Maurice F. O'Connell, et al, and due deliberation having been had and this Court having rendered its decision,

Now, upon motion of Charles A. Brind, Esq., attorney for Respondents-Respondents, it is

Appendix E—Order of Affirmance of Appellate Division, Third Department

ORDERED, pursuant to the beforementioned stipulation, that the order so appealed from be, and the same is hereby unanimously affirmed, without costs.

JOHN J. O'BRIEN
Clerk

A true copy,
JOHN J. O'BRIEN
Clerk

Entered November 3, 1960

APPENDIX F

Memorandum of Bookstein, J. in O'Connell v. Allen, et al.

SUPREME COURT

ALBANY COUNTY

[SAME TITLE]

(Supreme Court, Special Term, Albany County, January 22, 1960. Finally submitted February 16, 1960. Decided March 8, 1960.)

BOOKSTEIN, *J.*

The precise question raised in this proceeding was raised in the case of Wolfson vs. The State Education Department, et al., in which Mr. Justice Elsworth determined the matter adversely to the contention of petitioners herein. Not only do I feel bound by that decision but I find myself in accord therewith.

Motion to dismiss petition granted.

Submit order.

APPENDIX G

Order of Bookstein, J. Granting Motion to Dismiss Petition

At a Special Term, Part I of the Supreme Court held in and for the County of Albany at the Courthouse in the City of Albany, the 22nd day of January, 1960.

Present:

HON. ISADORE BOOKSTEIN,

Presiding.

In the Matter of the Application of

MAURICE F. O'CONNELL, et. al.,

Petitioners,

For an Order under Article 78 of the Civil Practice Act

—against—

JAMES E. ALLEN, Commissioner of Education of the State of New York, the State Education Department, Division of Professional Education, University of the State of New York,

Respondents.

The Petitioners, having moved this Court for an order under Article 78, Civil Practice Act, to review the determination of the respondents and directing the issuance of a certificate as a Certified Public Accountant to petitioners and said motion having regularly come on to be heard before me on January 22, 1960,

Appendix G—Order of Bookstein, J. Granting Motion to Dismiss Petition

Now, upon reading and filing the notice of motion, the petition of Maurice F. O'Connell, et al., duly sworn to on November 20, 1959, together with Schedule A attached thereto; the stipulations between the attorneys for Petitioners and Respondents stipulating that additional persons be made parties to these proceedings; the Respondents' Objection in Point of Law, dated January 15, 1960; the Order to Show Cause, signed January 18, 1960 by Honorable Isadore Bookstein, Justice of the Supreme Court; affidavit of Thomas G. Higgins, sworn to January 15, 1960; the Order, signed January 22, 1960 by Honorable Isadore Bookstein, permitting the New York State Society of Certified Public Accountants to appear and file a brief *amicus curiae* in these proceedings; and after hearing Sidney H. Asch, Esq., attorney for Petitioners, Charles A. Brind, Esq., attorney for Respondents, Elizabeth M. Eastman, Esq., of Counsel, and Cahill, Gordon, Reindel & Ohl, Esqs., attorneys for The New York State Society of Certified Public Accountants, Mathias F. Correa, Esq. of Counsel, and due deliberation having been had thereon,

Now, on motion by Charles A. Brind, Esq., attorney for Respondents, it is

ORDERED, that the petition herein be, and the same hereby is, dismissed in all respects.

ISADORE BOOKSTEIN
J. S. C.

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Enter

Dated, April 6th, 1960.

APPENDIX H

Statutes Involved

EDUCATION LAW (16 McKinney's Con. L. Part 3)

§ 7403, subd. 2, L. 1959, c. 718, § 1 (eff. April 23, 1959)

• • • • •

"2. An individual shall not be eligible to apply for a certificate as certified public accountant unless he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner, *and either* (a) *has been graduated from a college, offering a curriculum in accounting which shall have been registered by the department, or* (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner and has the professional experience required by the regulations of the commissioner and passes the examination required by the department or has passed, before the enactment of this article, all parts of the examination required by the department but has not received a certificate as a certified public accountant because of the lack of the professional experience required by the regulations of the commissioner. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners or corresponding agency in another state. (Emphasis supplied.)

EDUCATION LAW (16 McKinney's Con. L. Part 3)

§ 7403, subd. 2, L. 1960, c. 332 (eff. March 31, 1960)

Appendix II—Statutes Involved

AN ACT to amend the education law, in relation to the public practice of accounting

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two of section seven thousand four hundred three of the education law, as last amended by chapter seven hundred eighteen of the laws of nineteen hundred fifty-nine, is hereby amended to read as follows:

Section 2. An individual shall not be eligible to apply for a certificate as certified public accountant unless

(a) he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner; and

(b) either

(i) has been graduated from a college after completing a curriculum in accounting which shall have been registered by the department, or

(ii) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner; and

(c) either

(i) has the professional experience required by the regulations of the commissioner and passes the examination required by the department, or

(ii) has passed, before the enactment of this article, all parts of the examination required by the department but has not received a certificate as a certified public account

ant because of the lack of the professional experience required by the regulations of the commissioner.

The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners or corresponding agency in another state.

1 McKinney's Statutes

§ 76. *Statutes Too Clear for Construction*

Some statutes are framed in language so plain that an attempt to construe them is superfluous. The function of the courts is to enforce statutes, not to usurp the power of legislation, and if the legislative intent is clear no attempt at construction will be made. The courts will carry out the obvious intention of the lawmaking body, subject only to its power to strike down an enactment which conflicts with the state or federal constitution. When the language is explicit, the courts are bound to seek for the intention in the words of the act itself to the extent that they are not at liberty to suppose or to hold that the Legislature had an intention other than their language imports. But the fact that the words used are not ambiguous does not prohibit the courts from considering the surrounding circumstances, the canons of construction, acts in pari materia, and other considerations indicating the legislative intent, it is clear intent, not clear language, which precludes further investigation as to the interpretation of a statute. Language of a portion of an act, which, when separated from the rest,

is plain and unambiguous, may, when read in connection with the whole act, be thereby rendered ambiguous, and thereupon the necessity for construction arises. And, if a statute viewed from the standpoint of the literal sense of the language, works an unjust or unreasonable result, an obscurity of meaning exists which calls for judicial construction.

1 McKinney's Statutes

§ 193. *Significance of Change of Language*

It is a well settled rule that in a general code revision a mere change in phraseology does not import a change in construction. But the same rule does not apply where the Legislature deliberately changes a single section, or a few sections, of a law. In such cases it is thought that the Legislature, by changing intended to materially change the law, and courts must seek the new legislative purpose and construe the law so that it may be effectuated, for otherwise the amendment would be nugatory. It might occasionally happen, of course, that the Legislature in attempting to amend a statute would, by the use of inapt terms, really effectuate no change; but a construction which imputes such an inoffensive folly to the lawmaking body is to be avoided. Thus a material change in the phraseology of an act is generally regarded as a legislative construction that the law so amended did not originally embrace the amended provisions, and when provisions contained in an original act are omitted from an amendatory act, it is reasonable to presume that they were intentionally omitted. The force to be given subsequent legislation as affecting prior legislation also depends somewhat upon the time of the enactment and

the surrounding circumstances, including the history of the various enactments. If it follows soon after controversies have arisen as to the interpretation of the original act, it may well be construed as explanatory of the ambiguities over which such controversies arose. But if the change takes place after a considerable lapse of time and after the intervention of other sessions of the Legislature, it indicates an intention to supply some provisions not embraced in the former statute. The intervention of judicial decisions may also be a material element in determining the effect of an amendment. If a term or clause used in the original statute has been judicially construed, the retention of such term or clause in a subsequent amendatory act generally requires that it shall receive the same construction; but an amendment substituting a different term forceably indicates that the judicial decision did not correspond with legislative intent, and that a different interpretation should be had. Thus, if a statute is held by the courts to be discretionary and an amendment using the word "shall" is made almost immediately after the decision, an intention to make the statute preemptory is thereby indicated. So too, where the court in the construction of a statute has given considerable significance to certain phrases, the reenactment of the statute with the omission of such phrases, tends to show that the Legislature intended a different rule.

1 McKINNEY'S STATUTES

§ 365. *"Or" Construed as "And" and Vice Versa*

One mistake which is occasionally made by the drafters of statutes is the use of the word "and" when "or" is intended or vice versa. The popular use of "or" and "and"

is notoriously loose and inaccurate, and this use is reflected in the wording of statutes. When it is apparent that the Legislature has erroneously used the wrong word, the courts will make the necessary change in the statute in order that it shall conform to the legislative intent. In fact, the courts are always justified in departing from the literal meaning of words when necessary to preserve the intent of the Legislature. Normally, the Legislature accurately expresses itself, and the words are construed according to their grammatical meaning; but when the context of the statute and the surrounding circumstances indicate that the lawmakers have made an error in the choice of words, the court will not hesitate to construe the statute so as to effectuate the intent of the lawmakers. This change in conjunctions is made only to carry out the legislative intent; the courts will never indulge in such liberty with the words of a statute where the effect of the change will be to thwart the legislative purpose. *When "or" is used in connection with "either", it is difficult, if not impossible, to interpret it as "and".* (Emphasis supplied.)